Federal Court  Cour fédérale

Date: 20190723

Docket: T-948-19

Citation: 2019 FC 964

Ottawa, Ontario, July 23, 2019

PRESENT: Madam Justice McDonald

BETWEEN:

CHANI ARYEH-BAIN and IRA WALFISH

Applicants

and

THE CHIEF ELECTORAL OFFICER OF CANADA

Respondent

JUDGMENT AND REASONS

Overview

[1] The Applicants, Ms. Aryeh-Bain and Mr. Walfish, are Orthodox Jewish Canadians who seek judicial review of the decisions of the Chief Electoral Officer (CEO), who refused to exercise his discretion to recommend a change in the date of the federal general election scheduled for October 21, 2019 (also referred to as election day or polling day). They argue that the CEO has not properly considered their rights under the *Canadian Charter of Rights and*

Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[2] Ms. Aryeh-Bain is an Orthodox Jewish political candidate who has been nominated in the electoral district of Eglinton-Lawrence, and Mr. Walfish is an Orthodox Jewish political activist and voter. They argue that the date of the upcoming federal election of October 21, 2019, conflicts with the Jewish High Holiday of Shemini Atzeret.

[3] The CEO's powers and duties are outlined at section 16 of the *Canada Elections Act*, SC 2000, c 9 [*CEA*] and provide that the CEO shall exercise general direction and supervision over the conduct of elections; ensure fairness and impartiality in compliance with the Act; and exercise the powers and perform the duties and functions necessary for the administration of the Act. In fulfilling this mandate, the *CEA* specifically provides that the CEO may recommend to change the pooling day if, for example, it conflicts with a day of cultural or religious significance (section 56.2).

[4] On June 18, 2019, Associate Chief Justice Gagné of this Court set down the hearing of this Application on an expedited basis.

[5] Intervenor status was granted to B'nai Brith Canada (B'nai Brith), which describes itself as an advocate of the Jewish community and as "Canada's oldest independent, and self-funded Jewish organization", established in 1875.

[6] For the reasons that follow, this judicial review is granted as the overall decision of the CEO does not demonstrate the hallmarks of transparency, intelligibility, and justification, as it is not possible to determine if he undertook the necessary proportionate balancing between the Applicants' *Charter* rights and the exercise of his statutory duty.

Background

[7] Pursuant to the *CEA*, the 2019 federal election is scheduled to take place on October 21. The date coincides with the Jewish High Holiday of Shemini Atzeret which begins the evening of October 20 and ends the evening of October 22. During this period, orthodox observance involves refraining from numerous activities, including voting and campaigning. Orthodox Jewish persons are also restricted in what they may ask others to do, as Jewish law forbids encouraging another Jewish person from doing any work or any prohibited activity on their behalf. Thus, an orthodox member may not ask anyone to vote or campaign on their behalf on Shemini Atzeret.

[8] If the election is held on Shemini Atzeret, Ms. Aryeh-Bain, who is a candidate for the Conservative Party in her riding, must refrain from voting and campaigning during that period. Similarly, Mr. Walfish and other Orthodox Jewish voters (estimated to be 75,000 nationwide) will be unable to vote on election day or otherwise be involved in the election on that day.

[9] In addition to polling day being on Shemini Atzeret, two of the advanced polling days conflict with either the Sabbath (October 12) or the festival of Sukkot (October 14), both of

which are also Jewish holidays. The last day to obtain a special ballot (October 15) also falls on Sukkot.

[10] As a result of these conflicts, the ability of Orthodox Jewish voters and Orthodox Jewish candidates to participate in activities leading up to the election and on polling day itself will be restricted.

[11] In her Affidavit, Ms. Aryeh-Bain states that these restrictions will specifically impact her candidacy because 20% of the Eglinton-Lawrence riding is Jewish, including at least 5,000 Orthodox Jewish voters. It is considered a very competitive riding with a historically small margin of victory.

[12] As such, the Applicants have requested that the CEO recommend a change in the date of the election as contemplated by subsection 56.2(4) of the *CEA*.

Timeline

[13] On August 22, 2018, the Centre for Israel and Jewish Affairs (CIJA) advised the CEO that the date of the election coincides with annual Jewish High Holy Days and therefore "observant Jews will not avail themselves of the right to vote on that day." CIJA also provided the CEO with a list of the dates on which a Jewish High Holy Day will fall during the election period. According to this list, Sukkot coincides with an advanced polling date (October 14, 2019) and Shemini Atzeret coincides with polling day itself. In its letter, CIJA stated that observant Jewish voters would not be able to vote on polling day and, although CIJA explicitly stated that

it was not asking the date to be changed, it suggested working with the CEO to assist the Jewish communities most impacted.

[14] On August 29, 2018, Elections Canada issued a statement titled "Media Lines" which provided the following bulletin points:

- Election Canada does not choose the date of elections, including general elections,
    - the *Canada Elections Act* provides for a general election to be held on a fixed date; the next fixed election date is October 21, 2019.
- As is our practice, Elections Canada will adjust our operations to account for religious holidays, for example by adjusting how we select polling place locations, engage with and inform communities, and recruit and assign poll staff.

[15] This media statement explains that Elections Canada will accommodate Jewish voters affected by the election date. It does not reference the possibility of an alternate election day as provided for under the *CEA*.

[16] On March 15, 2019, an internally circulated Elections Canada email notes:

> We have decided that we will continue to work with the Jewish community at the national and local level as opposed to moving polling day to the following Monday Oct 28th. The rational [*sic*] is that our work with the community to date indicates they are happy to work with Elections Canada to ensure all voting options are explored and electors made aware of these options.

[17] On April 14, 2019, Ms. Aryeh-Bain won the Conservative Party nomination and was immediately concerned about the impact of the election date with Shemini Atzeret, and the effect it would have on her campaign. On April 18, 2019, she sent an email to the CEO expressing

these concerns and requested that the election date be moved to October 28, 2019. In her email she also raised concerns about her *Charter* rights, as follows:

> Having Jewish candidates and voters disadvantaged this way runs contrary to their right to equality under the Charter of Rights and Freedoms.

[18] On May 15, 2019, Rabbi Moshe Mordechai Lowy of Vaad Harabonim wrote to the CEO with respect to an unnamed observant Jewish candidate (presumably referencing Ms. Aryeh-Bain) who would be severely restricted in the ability to campaign starting from Sunday, October 13 due to religious restrictions.

[19] On May 17, 2019, CIJA sent another letter to the CEO explaining that although discussions to date had been focused on reasonable accommodations of Orthodox Jewish voters, after consultation with several rabbinic authorities, they requested that urgent consideration be given to moving the election day to October 28, 2019.

[20] On May 31, 2019, Mr. Walfish sent an email to the CEO explaining the impact of the current election date on the observant Jewish community, as an Orthodox Jewish voter himself.

[21] Additionally, over 140 Canadians have written to the CEO expressing similar concerns over the ability of members of the observant Jewish community to participate in the election and asking that the CEO consider moving the date of the general election.

Evidence

[22] In support of this judicial review application, the Applicants rely upon the following Affidavit evidence:

- Affidavit of Chani Aryeh-Bain, sworn June 17, 2019;
- Affidavit of Ira Walfish, affirmed June 17, 2019 ; and
- Affidavit of Rabbi Moshe Mordechai Lowy, affirmed June 16, 2019.

[23] The Respondent relies upon the Affidavit of Deputy Chief Electoral Officer, Michel Roussel, sworn on June 28, 2019.

[24] The Respondent also submitted documents from Elections Canada in compliance with Rule 317 of the *Federal Courts Rules*, SOR/98-106.

Canada Elections Act

[25] Part 5 of the *CEA* is titled "Conduct of an Election, Dates of General Election" and provides:

Powers of Governor General preserved	**Maintien des pouvoirs du gouverneur général**
56.1 (1) Nothing in this section affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General's discretion.	**56.1 (1)** Le présent article n'a pas pour effet de porter atteinte aux pouvoirs du gouverneur général, notamment celui de dissoudre le Parlement lorsqu'il le juge opportun.
Election dates	**Date des élections**

(2) Subject to subsection (1), each general election must be held on the third Monday of October in the fourth calendar year following polling day for the last general election, with the first general election after this section comes into force being held on Monday, October 19, 2009.

(2) Sous réserve du paragraphe (1), les élections générales ont lieu le troisième lundi d'octobre de la quatrième année civile qui suit le jour du scrutin de la dernière élection générale, la première élection générale suivant l'entrée en vigueur du présent article devant avoir lieu le lundi 19 octobre 2009.

Alternate day

56.2 (1) If the Chief Electoral Officer is of the opinion that a Monday that would otherwise be polling day under subsection 56.1(2) is not suitable for that purpose, including by reason of its being in conflict with a day of cultural or religious significance or a provincial or municipal election, the Chief Electoral Officer may choose another day in accordance with subsection (4) and shall recommend to the Governor in Council that polling day be that other day.

Jour de rechange

56.2 (1) S'il est d'avis que le lundi qui serait normalement le jour du scrutin en application du paragraphe 56.1(2) ne convient pas à cette fin, notamment parce qu'il coïncide avec un jour revêtant une importance culturelle ou religieuse ou avec la tenue d'une élection provinciale ou municipale, le directeur général des élections peut choisir un autre jour, conformément au paragraphe (4), qu'il recommande au gouverneur en conseil de fixer comme jour du scrutin.

Publication of recommendation

(2) If the Chief Electoral Officer recommends an alternate day for a general election in accordance with subsection (1), he or she shall without delay publish in the Canada Gazette notice of the day recommended.

Publication de la recommandation

(2) Le cas échéant, le directeur général des élections publie, sans délai, le jour recommandé dans la Gazette du Canada.

Making and publication of order

Prise et publication du décret

(3) If the Governor in Council accepts the recommendation, the Governor in Council shall make an order to that effect. The order must be published without delay in the Canada Gazette.	(3) S'il accepte la recommandation, le gouverneur en conseil prend un décret y donnant effet. Le décret est publié sans délai dans la Gazette du Canada.
Limitation	**Restriction**
(4) The alternate day must be either the Tuesday immediately following the Monday that would otherwise be polling day or the Monday of the following week.	**(4)** Le jour de rechange est soit le mardi qui suit le jour qui serait normalement le jour du scrutin, soit le lundi suivant.
Timing of proclamation	**Date limite de la prise du décret**
(5) An order under subsection (3) shall not be made after August 1 in the year in which the general election is to be held.	**(5)** Le décret prévu au paragraphe (3) ne peut être pris après le 1er août de l'année pendant laquelle l'élection générale doit être tenue.

CEO's Decision

[26] In the Applicants' amended Notice of Application they seek judicial review of "the decision of the CEO not to recommend to the Governor in Council (GIC) that the polling date for the federal general election be changed from Monday, October 21, 2019 to Monday, October 28, 2019."

[27] The CEO has maintained that "Elections Canada does not choose the date of the election" and "the CEO cannot now recommend a change in the date of the election". These positions are

outlined in the communications from the CEO. Those relevant to this judicial review are outlined below.

[28] By letter to Ms. Aryeh-Bain on May 7, 2019, the CEO responded to her request to change the election day by stating in part as follows:

> Thank you for your email dated April 18, 2019, regarding observance of Jewish holidays during the next federal general election. It is unfortunate that election day, October 21, 2019, falls on Shemini Atzeret. We thank you for raising the fact that observance of this holiday would preclude electoral participation on that day and may have an impact on your experience as a candidate. Elections Canada does not choose the election dates. The *Canada Elections Act* provides for a general election to be held on a fixed date. That being said, the government can call a snap election at any time.
>
> We were made aware of this issue in August 2018 by the Centre for Israel and Jewish affairs (CIJA). During our engagement with them since that time, we have discussed ways to ensure that the next general election will be as accessible as possible to electors who may not vote on election day in observance of Jewish holidays.

[29] The CEO's response then goes on to describe the range of early voting opportunities that are available in advance of election day. The CEO did not address Ms. Aryeh-Bain's specific concerns as a candidate or the *Charter* issues she raised.

[30] On May 30, 2019, the CEO responded to CIJA's second letter as follows:

> Following much consideration on the matter of recommending a change in the election date to Cabinet, I want to let you know that I am not ready to make that recommendation this close to the start of the election. I believe that Elections Canada is in a position to ensure that all voter services and candidate services can be carried out in advance of the Jewish High Holy Days. As such, I could not argue that we will not be able to deliver on our mandate. With

> regard to the balance of opportunity for Jewish and non-Jewish candidates, the Jewish High Holy Days fall within the election campaign period whether election day is held on October 21 or October 28. A change of the election date would affect the timing of the days of restricted activity, but not the duration.

[31] On June 4, 2019, the CEO responded by letter to Rabbi Moshe Mordechai Lowy and stated in part as follows:

> Your letter notes that I, as the CEO, have the discretion to move the date of the election. I wish to point out that this power is limited to making a recommendation to Cabinet, rather than to unilaterally move the election date. Following much consideration, I am not ready to make that recommendation this close to the start of the election....
>
> The decision not to recommend moving the election date takes into account a wide range of operational matters such as: the availability of suitable polling places (given that a polling place accessibility review has been completed for over 150,000 polling places); the employment of field staff for an additional week in 338 ridings; and the extension of all related contracts for field services by one week.

[32] The CEO provided similar responses to the various other requests he received.

Issues

[33] The parties are largely in agreement that the sole issue is the reasonableness of the CEO's decision not to recommend that the election date be moved because of a conflict with Shemini Atzeret.

[34] The Respondent also takes issue with the remedy of *mandamus* sought by the Applicants.

Standard of Review

[35] The Supreme Court of Canada has been clear that where an administrative decision engages a *Charter* protection, the reviewing court should apply "a robust proportionality analysis consistent with administrative law principles" (*Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 [*Loyola*] at para 3).

[36] *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*] recognizes that the decision-maker is generally in the best position to weigh the *Charter* protections with his or her statutory mandate in light of the specific facts of the case (at para 54). It follows that deference is warranted when a reviewing court is determining whether the decision reflects a proportionate balance, and that there may be more than one outcome that strikes a proportionate balance between *Charter* protections and statutory objectives (*Loyola* at para 41). If the decision falls within a range of possible, acceptable outcomes, it will be reasonable (*Doré* at para 56 citing *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 47). The traditional feature of the reasonableness standard of justification, transparency, and intelligibility are still applicable (*Dunsmuir* at para 47).

[37] Thus, an administrative decision will be reasonable if it reflects a proportionate balancing of the *Charter* protection with the statutory mandate (*Doré* at para 7 and *Loyola* at para 32).

Analysis

Applicants' Position

[38] Ms. Aryeh-Bain argues that as a candidate for federal office she is denied meaningful participation in the election contrary to sections 3 of the *Charter* because the current election date restricts her and her campaign team from participating in campaigning in the lead-up to the election and participating on election day.

[39] Mr. Walfish argues that as a voter his section 3 *Charter* rights are also infringed because he is prohibited from voting or volunteering on election day as it falls on Shemini Atzeret. He also points out that all observant Jewish voters are in a similar predicament and therefore they do not have the same rights of meaningful participation as other voters.

[40] The Applicants argue that in the circumstances their *Charter* rights of religious freedom under paragraph 2(a) and equality under section 15 are also infringed, and that special ballots and advanced polling opportunities do not remedy these infringements.

CEO's Position

[41] The CEO relies upon the Affidavit evidence of the Deputy Chief Electoral Officer Mr. Roussel who oversees preparations for the general election. He explains that Elections Canada is an independent, non-partisan agency headquartered in the National Capital Region. Its mandate is to administer elections in accordance with the law, including the *CEA*, and in a manner that is accessible, transparent, and fair to all participants.

[42] Mr. Roussel states that based upon earlier communications received, the CEO understood that non-Jewish employees and volunteers could campaign for candidates on the Jewish High

Holiday. Mr. Roussel states that it was only after the Applicants delivered their Affidavits on June 17, 2019, that the CEO became aware of the restrictions on Ms. Aryeh-Bain and her campaign.

[43] Nonetheless, it is the position of the CEO that moving the 2019 election date to October 28 would negatively affect the general election. In addition to a conflict with the Nunavut municipal elections, a move of the 2019 election date presents logistical concerns such as securing accessible polling locations for voters with disabilities. Mr. Roussel also states that a change in the election date would present challenges in recruiting qualified and capable election officials and staff.

[44] Elections Canada has been focused on providing voting opportunities for the observant Jewish community by increasing staffing at advanced polls, and by engaging in outreach and education regarding alternative voting measures.

Intervenor Submissions

[45] B'nai Brith submits that holding an election on a day of religious significance creates a disenfranchising barrier. They argue that advanced polling is not a sufficient accommodation where the fixed election date conflicts with a day of religious or cultural significance and for which the *CEA* has provided discretion to the CEO to recommend another date.

[46] B'nai Brith posits that the decision of the CEO not to recommend a change to the fixed election date infringes on the democratic rights of Canadian citizens and undermines the

legitimacy of the democratic process. B'nai Brith argues that holding an election on a day of religious significance renders the participation of affected citizens less meaningful because it impairs them: (a) as candidates from campaigning on election day; and (b) as voters from taking into account information arising late in the campaign.

Charter Provisions

[47] In their amended Notice of Application, the Applicants claim that their *Charter* rights under the following sections are at stake:

2. Everyone has the following fundamental freedoms:	**2.** Chacun a les libertés fondamentales suivantes
(a) freedom of conscience and religion;	*a)* liberté de conscience et de religion;
[...]	[...]
3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.	3. Tout citoyen canadien a le droit de vote et est éligible aux élections législatives fédérales ou provinciales.
[...]	[...]
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	**15. (1)** La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou

physiques.

[48] In their oral submissions, the parties focused primarily on section 3 of the *Charter*. Accordingly, for the purposes of these reasons, section 3 *Charter* rights will be the primary focus.

[49] Voting is a fundamental right and a core tenet of our democracy as entrenched in section 3 of the *Charter*. As stated by the Supreme Court of Canada most recently in *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 26:

> The central purpose of s. 3 is to ensure the right of each citizen to participate meaningfully in the electoral process (*Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at paras. 25-26). Civic participation is fundamentally important to the health of a free and democratic society. Democracy demands that each citizen have a genuine opportunity to participate in the governance of the country through the electoral process. If this right were not protected adequately, ours would not be a true democracy (*Figueroa*, at para. 30).

[50] In *Figueroa v Canada (Attorney General)*, 2003 SCC 37 [*Figueroa*], the Supreme Court stated that "the purpose of s. 3 includes not only the right of each citizen to have and to vote for an elected representative in Parliament or a legislative assembly, but also the right of each citizen to play a meaningful role in the electoral process" (at para 25). In describing what is meant by a "meaningful role", the Court went on to clarify that it signifies the right of each citizen to a certain level of participation in the electoral process (at para 26).

Charter Framework and Proportionate Balancing

[51] The law is clear that administrative decision-makers must act consistently with the *Charter* when exercising their statutory discretion. Administrative decision-makers must "always consider fundamental values" when exercising their discretion and are "empowered, and indeed required, to consider *Charter* values within their scope of discretion" (*Doré*, at para 35). Therefore, decision-makers must render decisions in accordance with the *Charter* by considering the *Charter* values themselves.

[52] The *Doré* framework was recently reaffirmed in *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, at para 57 [*TWU*], where the Supreme Court states that "...*Charter* rights are no less robustly protected under an administrative law framework." The Court went on to explain as follows at paras 58 and 59:

> [58] Under the precedent established by this Court in *Doré* and *Loyola*, the preliminary question is whether the administrative decision engages the *Charter* by limiting *Charter* protections — both rights and values (*Loyola*, at para. 39). If so, the question becomes "whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play" (*Doré,* at para. 57; *Loyola*, at para. 39). The extent of the impact on the *Charter* protection must be proportionate in light of the statutory objectives.
>
> [59] *Doré* and *Loyola* are binding precedents of this Court. Our reasons explain why and how the *Doré/Loyola* framework applies here. Since *Charter* protections are implicated, the reviewing court must be satisfied that the decision reflects a proportionate balance between the *Charter* protections at play and the relevant statutory mandate. This is the analysis we adopt.

[53] These considerations apply to the CEO in the exercise of his statutory duties pursuant to subsection 56.2(1) under the *CEA*. In considering the exercise of his statutory discretion, the CEO must undertake a proportional balancing that "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" (*TWU* at para 35 quoting *Loyola* at para 40). Balancing requires the CEO to engage in a full consideration of the statutory and factual contexts.

[54] In particular, the CEO had to consider if the Applicants' observance of their religious freedom interferes with their rights to "meaningful participation" in the upcoming general election considering that, because of their religious beliefs, they are prevented from fully participating in the activities in the lead up to election day, and prevented from casting their ballot on election day.

[55] However, the CEO's position as reflected in his communications and the communications of Elections Canada is grounded on the position that the fixed date of October 21, 2019, is immutable. In his responses the CEO emphasizes that the *CEA* "provides for a general election to be held on a fixed date" and that "Elections Canada does not choose the election date". He also provides various reasons and justifications as to why the election date cannot now be changed including costs, agreements on polling locations, accessibility concerns, logistical challenges, and, more recently, the Nunavut municipal elections.

[56] There can be no question that the planning and organization required in advance of the federal general election is extensive and complex and all of the reasons provided as to why the

date cannot be change may very well be justified. However, notwithstanding this, the CEO was required to assess the impact of the election date being in conflict with a day of "religious significance" and to consider the discretion he has been granted by Parliament pursuant to subsection 56.2(1) of the *CEA*.

[57] The record does not disclose that the CEO gave proper, or any true consideration, to this discretion. The record does not indicate how or if the CEO "balanced" these considerations against the *Charter* values of Orthodox Jewish voters and candidates to ensure their rights to "meaningful participation" are respected. The CEO's efforts were focused on advance polling and special ballot options. No consideration appears to have been given to recommending a date change.

[58] On review of the reasonableness of the CEO's decision, *TWU* explains that a reasonable decision is not necessarily a decision which fully protects *Charter* rights as follows at paragraph 81:

> [81] The reviewing court must consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives. This does not mean that the administrative decision-maker must choose the option that limits the *Charter* protection least. The question for the reviewing court is always whether the decision falls within a range of reasonable outcomes (*Doré*, at para. 57; *Loyola*, at para. 41, citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, at para. 160). However, if there was an option or avenue *reasonably* open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant statutory objectives, the decision would not fall within a range of reasonable outcomes. This is a highly contextual inquiry.

[59] This is consistent with *Opitz v Wrzesnewskyj*, 2012 SCC 55, where the Supreme Court states that while enfranchisement is a cornerstone of the *CEA*, it is not a free-standing right and (para 38) and neither the *CEA* nor the *Charter* guarantee unrestricted participation in elections (*Figueroa* at paras 25 and 36).

[60] Accordingly, the CEO did not have to arrive at a decision that perfectly balances *Charter* values against his statutory mandate. What the CEO was required to do was consider the exercise of his discretion as "an option or avenue *reasonably* open" to him that would reduce the impact on the Applicants' *Charter* rights and still allow the CEO to further the relevant statutory objectives. This is the contextual assessment and the balancing exercise that was to be undertaken by the CEO and that the Court looks for when assessing the reasonableness of the resulting decision. As noted however, there is a lack of evidence on the record to demonstrate that the CEO undertook the requisite proportionate balancing of the *Charter* infringements with the objectives of the *CEA*.

[61] On judicial review, this Court does not conduct a *de novo* review of this balancing exercise, but rather reviews whether the balancing was reasonable (*Doré,* at paras 45 and 51). However, the Court cannot meaningfully do so when there is an absence of evidence of the CEO's consideration of the *Charter* values at play. In these circumstances, the CEO's reasons and explanations for pressing forward with the fixed election date focus primarily on operational or logistical concerns in changing the election date, but do not truly consider the option of another date, which is a power within his statutory mandate.

[62] I acknowledge that it is possible for a decision-maker to implicitly consider *Charter* values. In the companion case to *TWU, Trinity Western University v Law Society of Upper Canada,* 2018 SCC 33, the Court concluded at paragraph 29 that despite the fact there were no reasons offered by the decision-maker, the Court could conduct judicial review based on the reasons which "could be offered" and the record. This is consistent with the Supreme Court's previous findings in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para14 [*Newfoundland Nurses*] that courts should conduct a holistic review of administrative decisions with regard to the record.

[63] The Supreme Court has been clear that reviewing courts owe deference to administrative decision makers such as the CEO. However, this Court cannot defer to a decision that does not provide any explicit or implicit evidence of proportionate *Charter* balancing. It is the CEO's responsibility to consider the *Charter* rights and values and provide evidence of engagement with the *Charter*.

[64] On this judicial review, it is not the role of this Court to consider an appropriate date for the federal election. Rather this Court is only concerned with whether the CEO properly balanced the statutory objectives with *Charter* rights and values. Where, as here, the record is silent on how the CEO considered and balanced the *Charter* issues, it is impossible to for the Court to determine if the balancing was proportionate (*Loyola* at para 68). Simply put, the record does not disclose the necessary balancing of rights and freedoms in relation to the statutory objectives. The result is a disproportionate outcome that does not

protect *Charter* values as fully as possible in light of those statutory objectives. This is contrary to the framework outlined in *Doré* and *Loyola*, and refined in *TWU*.

[65] Therefore, by failing to address and balance the specific *Charter* issues raised by the Applicants, the CEO's decision is not justifiable, transparent, and intelligible in keeping with *Dunsmuir* (at para 47).

Mandamus

[66] The Applicants seek a *mandamus* order that this Court direct that the CEO recommend to the GIC that the polling date for the federal general election be changed to Monday October 28, 2019. However, having found that the decision of the CEO is unreasonable, in my view, the appropriate remedy is to remit the matter back to the CEO for reconsideration.

[67] It is not the role of this Court to set the election date or to substitute its decision for that of the CEO's, thus *mandamus* is not an appropriate remedy. A *mandamus* order can only be directed in the exercise of discretionary statutory duties where specific criteria are satisfied (*Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 (FCA), aff'd [1994] 3 SCR 1100). I am not satisfied that the necessary circumstances arise in this case to warrant the issuance of a *mandamus* order.

[68] I note that Parliament has granted the CEO discretion to make a recommendation for a change to the election date up until August 1 (*CEA* subsection 56.2(5)). Although the August 1

deadline is fast approaching, legal counsel for the CEO indicated that he is prepared to take whatever action is necessary as a result of the Court's decision.

Conclusion

[69] The Application for judicial review will be granted and the matter is sent back to the CEO for a redetermination that reflects a proportionate balancing of the *Charter* rights with the statutory mandate.

[70] The Applicants do not seek costs in the form of legal fees but ask to be reimbursed for disbursements. Accordingly, the Applicants are entitled to reimbursement for their reasonable disbursements.

JUDGMENT in T-948-19

THIS COURT'S JUDGMENT is that:

1. This judicial review is granted and the matter is sent back to the CEO for a redetermination that reflects a proportionate balancing of the *Charter* rights with the statutory mandate;

2. The CEO shall make his redetermination by August 1, 2019; and

3. The Applicants shall have their reasonable disbursements.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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